

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TODD C. CLAYTON)	
Claimant)	
)	
VS.)	
)	
PRICE CHOPPER/FOUR B CORP.)	
Respondent)	Docket Nos. 242,117 &
Self-Insured)	247,337
AND)	
)	
CIGNA)	
Insurance Carrier)	

ORDER

The self-insured respondent and the respondent and its insurance carrier, CIGNA, request review of a preliminary hearing Order entered by Administrative Law Judge Steven J. Howard on April 8, 2002.

ISSUES

The Administrative Law Judge (ALJ) awarded temporary partial compensation at the rate of \$359.38 per week commencing on February 22, 2002, until March 27, 2002, and medical care with Dr. Glenn Amundson to be paid one-half by respondent and one-half by its insurance carrier, CIGNA.¹

Respondent/self insured, argues claimant did not suffer personal injury by accident arising out of and in the course of employment on December 7, 2001, because his injury, if any, was the result of a personal non-work-related risk. In the alternative, respondent/self-insured, argues claimant's current need for compensation benefits was caused by and is a natural progression of the injuries claimant suffered on April 13, 1998, while Cigna was providing respondent's workers compensation insurance coverage.

Respondent and its insurance carrier, CIGNA, argue claimant suffered a new intervening injury on or about December 7, 2001, and that respondent/self-insured is liable for compensation for such injuries because Cigna was no longer providing respondent's workers compensation insurance coverage at that time.

¹ The respondent was self-insured on two of claimant's alleged dates of accident and insured by Cigna on one of claimant's alleged dates of accident.

The claimant argues the ALJ's Order providing compensation benefits should be affirmed but adopts the respondent/Cigna's argument that he suffered an additional work-related injury on or about December 7, 2001.

The issue for determination by the Board is whether claimant suffered accidental injury arising out of and in the course of employment on or about December 7, 2001.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant alleges three dates of accident. The first date of accident is July 1, 1997, at which time respondent was self-insured. The respondent/self insured admits that claimant suffered accidental injury arising out of and in the course of employment on that date.

The second date of accident is April 13, 1998, at which time respondent was insured by Cigna. The respondent/Cigna admit that claimant suffered accidental injury arising out of and in the course of employment on that date.

The third alleged accidental injury date is on or about December 7, 2001, at which time the respondent was again self-insured. Respondent/self-insured denies claimant suffered accidental injury arising out of and in the course of employment on that date and denies timely notice.

All of the parties agreed that if temporary partial disability compensation was related to the accidental injury of April 13, 1998, the appropriate rate would be \$167.57. If related to the alleged accidental injury of December 7, 2001, the temporary partial disability compensation rate would be \$359.38. The ALJ determined claimant was entitled to temporary partial disability compensation at the rate of \$359.38.

Before the third alleged incident occurred the claimant had received treatment from Dr. Amundson. At his last visit with the doctor on October 26, 2001, the claimant noted he was feeling great and had returned to working 10-hour days at a light physical demand level. The doctor noted claimant was at maximum medical improvement but still needed to reduce the quantity of the medication he was taking. The doctor changed claimant's work restrictions to a medium physical demand level. A follow-up appointment was scheduled in four weeks.

Claimant noticed that sometime in late November his back started to get worse while he performed his normal job duties. In the course of his employment claimant was walking to the back of the store and he felt a pulling sensation in his back whereupon his back condition returned to how it had felt before treatment. Claimant advised the store

director about his worsening back condition and that he would discuss the problem with Dr. Amundson at the next scheduled appointment. The claimant's back condition worsened as he continued working after the incident when he felt the pulling sensation in his back.

Claimant agreed that the incident where he felt the pulling sensation in his back occurred while he was walking to the restroom at the back of the store. He further agreed that the return of his pain occurred approximately the same time that Dr. Amundson began to reduce the amount of medication he had been taking.

At the December 7, 2001, appointment with Dr. Amundson, claimant noted he was doing great at work until he felt a pop in his back. The doctor continued claimant on restrictions at a medium physical demand level and concluded he needed to monitor the claimant's condition, which he termed an "exacerbation or flare up," before claimant would be considered at maximum medical improvement.

Claimant saw Dr. Amundson on January 11, 2002, and the doctor noted claimant's pain pattern had changed in that he exhibited bilateral lower extremity pain to the level of the anterior ankle.

When a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.² However, where the worsening or a new injury would have occurred absent the primary injury or where it is shown to have been produced by an independent intervening cause, it is not compensable.³

Claimant described an incident where he felt a pulling sensation in his lower back as he walked from the front of the store to the back. Claimant thought he might have been going to the restroom at the time. Respondent/self-insured argues that because claimant was not performing any work activity that such incident was a personal or neutral risk not associated with his job. Stated another way, the accident did not arise out of claimant's employment.

The parties focus on claimant's description of the pulling sensation he experienced while ostensibly walking from the front of the store to the restroom in the back of the store. Restroom breaks are incidental to employment. Therefore, accidents that occur during such activity may be compensable under the Workers Compensation Act. However, this overlooks claimant's testimony that both before and after that particular incident his back condition continued to worsen as he performed his job duties. Claimant testified:

² *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

³ *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

Q. Okay. So you gave them a pretty good description as to how you were feeling due to the walking or from something that day in the store, correct?

A. Yes.

Q. Did you have any discussion with them that your back had been getting worse since you returned to work?

A. Yes. We've had lengthy conversations because my store director had a similar procedure.

Q. Very good. So then you got two weeks in between the time that you see Amundson from the time that you notice this problem while you're walking through the store, correct?

A. Yes.

Q. And so does your back even get worse between the time that you tell them in late November and the time you see Amundson?

A. Yes.

Q. And what job duties that you were doing made your back worse before you got to see Dr. Amundson in December?

A. Just the same thing I'd been doing.

Q. Which would be?

A. Front end supervisor, just everything that goes along with the grocery store.

Q. Anything that you would do at the grocery store, which means you handle groceries, you stock groceries, you work with grocery carts, you work with customers, you do all those things?

A. Yes.⁴

The evidence establishes that as claimant continued to perform his job duties after the incident where he felt a pulling sensation in his back, his condition continued to worsen. It is well established under the Workers Compensation Act in Kansas that, when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.⁵

⁴ P.H. Trans. at 12-13.

⁵ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

At this juncture of the proceedings, claimant has established he suffered an aggravation or worsening of his preexisting back condition and such series of traumas constitute an injury. Moreover, claimant's uncontradicted testimony establishes that he gave timely notice that his back condition was worsening.

Having established the new injury occurred during the period of time that respondent was self-insured, the ALJ's award is modified to reflect the temporary partial disability compensation and medical treatment is to be provided by the respondent/self-insured.

As provided by the act, preliminary findings are not binding but subject to modification on a full hearing on the claim.⁶

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of ALJ Steven J. Howard dated April 8, 2002, is modified in accordance with the foregoing.

IT IS SO ORDERED.

Dated this _____ day of November 2002.

BOARD MEMBER

c: Keith L. Mark, Attorney for Claimant
H. Wayne Powers, Attorney for Respondent/Self-Insured
Frederick J. Greenbaum, Attorney for Respondent and Cigna
Steven J. Howard, Administrative Law Judge
Director, Division of Workers Compensation

⁶ K.S.A. 44-534a(a)(2).